No. 15,343.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Cross-Appellant,
v.
MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Cross-Appellees.

PETITION

Of Defendants-Appellants to Modify Opinion or for a Rehearing.

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Of Defendants-Appellants to Modify Opinion or for a Rehearing.

Come now Mike H. Kostelac and Maryland Casualty Company, Defendants-Appellants herein, and move the Court to modify its opinion filed herein on June 28, 1957, as follows: By deleting the requirement in the opinion that this case be "remanded to the District Court to find the reasonable value of the food collected by Kostelac and render judgment to the United States therefor", or by modifying such language as requested hereinafter; or, in the alternative, for a rehearing on such portion of the opinion.

As ground for this motion, Defendants-Appellants state that upon the rescission of this contract, as decreed by this Court in said opinion, any right, if any, in plaintiff to recover for the reasonable value of any goods delivered is

based upon the law of quasi contract, and the legal rules concerning quantum meruit or quantum valebat; that under the facts and undisputed evidence in the record of this case, such recovery, if any, would be limited to the value of the benefit to defendant Kostelac of the goods received by him under the voidable contract, and the evidence in this case conclusively shows that such goods were of no value or benefit to said defendant.

As further ground, Movants state that Plaintiff-Appellee in this action has elected to stand or fall upon recovery under the written contract; that Plaintiff has failed to request recovery on the basis of quantum valebat in its pleadings; that Plaintiff has excluded quantum valebat as an issue in the complete Pre-Trial Stipulation of the parties herein, and has expressly limited itself to recovery under the voidable contract in the trial of this cause, and upon the appeal of this cause.

In the event this Court should not delete the above provision in the opinion for remanding this cause, Defendants-Appellants move this Court to modify said language by directing the District Court to proceed with the further hearing of this cause on the basis of quasi-contract recovery or quantum valebat, based upon a requirement that plaintiff's recovery be limited to the amount, if any, of the direct pecuniary advantage to defendant Kostelac from his receipt of said food.

In the alternative, Defendants-Appellants move the Court for a rehearing on the above question of recovery by the Plaintiff-Appellee.

EISENHOWER, HUNTER, RAMSDELL & DUNCAN,
TENNEY, DAHMAN & SMITH,
Attorneys for Defendants-Appellants,
Mike H. Kostelac and Maryland
Casualty Company, a Corporation.

MEMORANDUM IN SUPPORT OF PETITION TO MODIFY OPINION.

At the end of the opinion filed herein on June 28, 1957, this Court has remanded this cause to the District Court to "find the reasonable value of the food collected by Kostelac and render judgment to the United States therefor."

The question of quantum meruit or quantum valebat recovery by the Government in this action had not been briefed or raised on this appeal, and it was not relevant to the principal issues involved. In the interest of avoiding future conflicts, or possible future appeals in the conflict which is over eleven years old and has caused untold loss to Defendant Kostelac, we respectfully suggest the following, which relates solely to the single matter of quasi-contractual recovery.

Under the peculiar facts of this case, as distinguished perhaps from the majority of cases involving quasi-contractual recovery, the government's recovery on quantum valebat herein, under the decisions, would not be determined solely by testimony concerning the price that would be paid by a willing buyer to a willing seller for the food picked up by defendant Kostelac between July 1, 1946, and December 15, 1946.

The application of a different rule in this case results from the fact that here defendant Kostelac, probably with no blame on his part, suffered a financial loss from collecting the food, so that there was lacking the usual element of "benefit to the recipient." We refer briefly to the facts in evidence on this appeal, before citing authorities.

When defendant Kostelac discovered a mistake in his contract, immediately after he commenced performance on July 1, 1946, he was directed by the contracting officer to continue to haul the garbage while an effort was being made to correct the mistake in the contract (Tr. 140).

Defendant Kostelac did as requested, and hauled the garbage for the first three weeks to his Gig Harbor farm preparatory to setting up a new farm at Roy, Washington, near Fort Lewis, and he paid the expensive double ferry tolls on each trip, carrying the garbage an impractical distance in the interim (Tr. 161). Defendant Kostelac had told the government that he was setting up his farm at Roy, Washington, making the express statement on the last page of his bid (Exhibit 1 in this case).

After defendant Kostelac was ready to set up his Roy, Washington, farm after approximately three weeks performance under the contract, the testimony shows that he held up setting up the new farm, because of the dispute over the mistake in his contract (Tr. 173). As the direct result of the government's request that he continue to carry off the garbage, and as the direct result of the delay involved in the government's consideration and ultimate rejection of Mr. Kostelac's proper request to correct the obvious mistake, while the matter was being considered in San Francisco and Washington *Mr. Kostelac dumped all the garbage at a complete loss during the entire five month period to December 15, 1946* (Tr. 158, 173).

There is no question from the undisputed evidence in the Record that the very slight benefit, if any, derived by Kostelac for the first *three weeks* of the contract, when he hauled the garbage a long distance over expensive ferries, was more than offset by *five months* of continual dumping of the garbage thereafter at a complete loss to defendant Kostelac for all labor and equipment costs in this very large operation. During all this period the government delayed, and finally refused to correct the obvious mistake in Kostelac's contract of which it had full knowledge (Tr. 98-106, esp. 104) but which information was withheld from defendant Kostelac (Tr. 138).

The applicable law is collated in the *Restatement of Restitution,* Section 155, p. 611, as follows:

"Non-Tortious Recipient Not More at Fault Than Claimant.

"(1) Where a person is entitled to restitution from another because the other, without tortious conduct, has received a benefit, the measure of recovery for the benefit thus received is the value of what was received, *limited, if the recipient was not at fault or was no more at fault than the claimant, to ITS VALUE IN ADVANCING THE PURPOSES OF THE RECIPIENT*, except . . ."

Comment (p. 612):

"a. . . . The rule applies where property has been transferred. . . . as the result of a transaction between the claimant and the person benefited, which transaction has been *rescinded because of mistake* . . ."

"b. *Advancing the purpose of the recipient.* This phrase has reference to the fact that *the value of what is given may not be the same as the value of the benefit received by the recipient considering his purposes.*" (Emphasis supplied.)

At the beginning of the *Restatement of Restitution,* sec. 1, e, the following rule is also set forth:

"*Where benefit and loss do not coincide.* There are situations, however, in which a remedy is given under the rules applicable to this subject, where the benefit received by the one is less than the amount of the loss which the other has suffered. In such case, if the transferee was guilty of no fraud, the amount of recovery is usually limited to the amount by which he has been benefited."

The rule is also explained in *Williston on Contracts,* Revised Edition, Vol. 5, sec. 1575, pp. 4404-4406, where the identical question as to amount of recovery in case of mistakes in contracts was considered as follows:

"*Recovery of the value of goods delivered or services rendered under a mistake.* . . . It may be supposed, however, that goods or other property have been transferred, and that neither they nor traceable products of them are in existence, but that, nevertheless, a pecuniary benefit has been received from their use. It may be argued with great force that on principles of quasi contract, recovery of the value of this benefit should be permitted; but it may be replied that to allow such recovery is, in effect, to force a bargain upon an innocent defendant for what he may not have desired to buy on such terms (citing cases). In spite of the latter argument it seems the lesser evil, if the plaintiff has been guilty of no negligence, to allow recovery of the value of the benefit received *TO THE EXTENT THAT THE PROPERTY HAS BEEN OF DIRECT PECUNIARY ADVANTAGE TO THE RECIPIENT*" (citing cases). (Last emphasis supplied.)

The same rule is given in *Corbin on Contracts,* Volume 3, Section 599 "Mistake", pp. 363-4:

"For performance in such a case (of mistake), recovery must be quasi-contractual in character, generally based upon the *value of the benefits actually received by the other party.*" (Emphasis supplied.)

The decisions by the Federal courts follow the above rules of law as to quasi-contractual recovery:

Pittsburgh, C. etc., Ry. Co. v. Keokuk and Hamilton Bridge Co. (U. S. Supreme Court, 1889), 131 U. S. 371, l. c. 389, 9 Sup. Ct. 770;

Morton v. Roanoke City Mills, Inc. (C. A. 4, 1926), 15 Fed. (2d) 545, l. c. 547;

Andrew Bros. Co. v. Youngstown Coke Co. (C. A. 6, 1898), 86 Fed. 585, l. c. 596-7;

In re Irving-Austin Bldg. Corp. (C. A. 7, 1939), 100 Fed. (2d) 574, l. c. 578.

In the Pittsburgh, C. etc., Ry. Co. case, supra, the Supreme Court stated that (l. c. 389):

> ". . . according to many recent opinions of this Court . . . the proper remedy of the party aggrieved (because a contract is ultra vires) is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of *what the defendant has actually received the benefit of.*" (Citing five other U. S. Supreme Court decisions.) (Emphasis supplied.)

In the case of *Morton v. Roanoke,* supra, the Court went so far as to instruct the jury (l. c. 547) that "*his (plaintiff's) profit or loss was not relevant to the inquiry. The benefit to the defendant was the proper test.*" (Citing treatises by Williston and Woodward.) (Emphasis supplied.)

We feel strongly that the reason for the above rule of law is well demonstrated in the present case. Mr. Kostelac had contracted for a five-year contract with operations at his farm at nearby Roy, Washington, which he was ready to set up (as stated in his bid). He had no desire for a contract on any other basis, and it was only by force of circumstances that he obligingly removed the garbage for the Government and dumped it at a loss pending settlement of the dispute.

A further basis for excluding quantum meruit recovery in the present case is that the Government has never requested it. We believe that it was because of the above-cited rule limiting quantum valebat recovery to the amount of the benefits, that there has never been a suggestion of a request or alternative request for such recovery in any of the pleadings, the pre-trial stipulation, the trial of the cause, or on this appeal. More than that, the government has specifically limited the issues in the Pre-Trial Order (Tr. pp. 67-68); and upon the trial of this case the government caused evidence to be excluded which would

further bear on the subject of quantum valebat. We refer to pages 141-142 of the printed transcript herein, in which we specifically raised the question of "whether there is an effort here to hold Mr. Kostelac on Quantum Meruit or Quantum Valebat." Upon the government's objection, the Court excluded evidence on this matter, and stated (Tr. 142):

> "As I read the pre-trial order, they (the government) were relying solely on this contract. At least, that is the way I read the pre-trial order. Until I see something more about it, I will sustain the objection."

We, therefore, contend that on the basis of the pleadings, the Pre-Trial Order, the statements at the trial of this cause, and the theory of this appeal, this Court would be justified in concluding that there is no issue of quantum valebat in the action.

Even if quantum valebat were not thus excluded from the case because of the pleadings, stipulation, etc., we submit that the undisputed evidence, as set out above, patently shows that Mr. Kostelac did not derive one cent of advantage from the pickup of the food, and because of this undisputed evidence in the record on this appeal, there is nothing in the record that requires a further hearing in the District Court.

In the event, however, that the Court feels that the matter should be heard further in the District Court, we respectfully request that the language in the opinion be slightly modified. Although this Court in its opinion doubtlessly intended that future hearings in the District Court should be in accordance with the law of Quasi Contract, still the words, "find the reasonable value of the food collected by Kostelac and render judgment to the United States therefor," might be argued to mean that the District Court is not to consider the question of whether Kostelac actually received a benefit. We suggest

that it would prevent future conflict in further hearings of this cause, and possibly further appeals if there might be added to the opinion the requirement that the District Court hear evidence on the question of quasi contractual recovery under the law relating thereto. If the Court desires to do so, we believe it would clarify the matter further to state that the recovery, if any, on such future hearing shall be limited to the amount of benefit, if any, to Kostelac as the result of his pick-up of the food.

In the alternative, defendants-appellants move for a rehearing of the above matter.

Respectfully submitted,

EISENHOWER, HUNTER, RAMSDELL & DUNCAN,
TENNEY, DAHMAN & SMITH,
Attorneys for Defendants-Appellants,
Mike H. Kostelac and Maryland
Casualty Company, a Corporation.

State of Missouri }
City of St. Louis } ss.

E. H. Tenney, Jr., being duly sworn on his oath, states that he is one of counsel for defendants-appellants herein, and certifies that in his judgment the foregoing Petition to Modify Opinion or for a Rehearing is well founded and that it is not interposed for delay.

s/ E. H. Tenney, Jr.

Subscribed and sworn to before me this 17th day of July, 1957.

s/ Marie Eaton,
Notary Public.

My commission expires April 8, 1959.